SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This is an application for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Second Circuit, which modified and affirmed as modified an Order of the National Labor Relations Board.

Opinions.

The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 586; and those of the National Labor Relations Board in 5 N. L. R. B. 206, 7 N. L. R. B. 836 and 19 N. L. R. B. No. 71.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are sufficiently stated on pages 7 and 8 of the petition annexed hereto.

Facts.

The material facts and circumstances are set forth in the petition annexed hereto. The questions involved are also stated in the petition but may, for convenience, be recapitulated here:

1. Whether, under Section 9 (a) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 159) a Union which has received a majority of the votes cast in an election, but not the affirmative vote of a majority of the employees in the appropriate unit, is entitled to act as the exclusive bargaining agent of all such employees.

2. Whether, under the facts of this case, it was an abuse of the Board's discretion to refuse to permit petitioner to have a representative present at the election for the purpose of checking the identity and eligibility of persons who presented themselves to vote, of challenging those deemed ineligible, and of determining whether or not said election was conducted according to the Direction of Election.

3. Whether persons who have been discharged for a valid business reason and whom the employer is under no commitment or duty to rehire are eligible to vote in an election to determine the bargaining representative for said employer's employees.

4. Whether the record contains any substantial evidence showing that petitioner discriminatorily discharged Francis B. Winans and Herbert S. Anderson because of Union membership or activity.

ARGUMENT.

I. The majority necessary to entitle a union to represent all employees in a unit is an important question of statutory construction which should be settled by this Court.

II. This Court should review the abuse of the Board's discretion in denying petitioner representation at the election.

III. The eligibility of discharged employees to vote in a bargaining election presents an important question of Federal law which has not been, but should be, settled by this Court.

IV. In holding that the Board's findings were supported by evidence, the decision of the Circuit Court of Appeals is probably contrary to prior decisions of this Court.

Point I. The majority necessary to entitle a union to represent all employees in a unit is an important question of statutory construction which should be settled by this Court.

The question of the majority necessary to entitle a union to act as the bargaining representative of all employees in the appropriate unit is of the greatest importance in the administration of the National Labor Relations Act (49 Stat. 449 *et seq.*).

Section 9 (a) of said Act (49 Stat. 453, 29 U. S. C. A. § 159 (a)) provides:

> "Representatives *designated* or selected for the purposes of collective bargaining *by a majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * * (italics supplied.)"

The Board itself has successively announced and adopted three different rules on the subject.

Commerce Clearing House, Inc., Labor Law Service (Pars. 4510-4520).

See also *First Annual Report, National Labor Relations Board,* (1936) pp. 89, 108.

First the Board adopted what petitioner contends is the correct rule, namely, that a Union must receive the actual designation of a majority of the employees before it is entitled to act as the representative of all.

Chrysler Corp., 1 N. L. R. B. 164.

Later the Board adopted the so-called "quorum rule", namely, that a Union receiving a majority of the votes at an election in which a majority of the employees participated was entitled to act as the bargaining representative of all of the employees, notwithstanding that its vote was less than a majority of all such employees.

The Associated Press, 1 N. L. R. B. 686, (this point was not involved in the review of this case by this Court, 301 U. S. 650).

New England Transportation Co., 1 N. L. R. B. 130; *Lukenbach Steamship Co.*, 2 N. L. R. B. 181.

This "quorum rule" seems to have been approved by the only court which has passed upon the question.

N. L. R. B. v. *Whittier Mills Co.*, 111 F. (2d) 474 (C. C. A. 5).

Nevertheless, the Board, in *R. C. A. Mfg. Co. Inc.* 2. N. L. R. B. 159, adopted still a different rule, namely, that a Union which receives a majority of the votes at an election is entitled to certification as the bargaining representative of all employees in the unit, regardless of the number of voters participating in such election. The certification in the instant case purports to have been made under this rule (Res. Ex. 4, Case No. III-C-165, R. 128, 130, 258). No court has yet expressed its approval of this third rule.

Furthermore, even at the present time, the Board interprets the statute in different ways when the proof of majority designation is presented by different methods. Thus if the designation is shown by union membership or desig-

nation cards, the Board correctly insists that affirmative designation by a majority of the employees in the unit be shown whereas, as above stated, if designation is made through an election, the Board requires only a majority of the votes cast, regardless of the relation of such number to an actual majority of the employees eligible. The Act itself makes no such differentiation. True, it contemplates that various means may be employed to prove designation, but it provides one simple rule for determining whether majority designation has been achieved, whatever the means employed for proving it, namely that the exclusive representatives shall be the "representatives *designated* * * * *by a majority of the employees in a unit.*"

Petitioner contends that the rule originally adopted by the Board is correct, and that the later interpretations are erroneous. The language of the Act itself is clear and unambiguous and literally requires, as admitted by the court below (116 F. (2d) 586, 588, R. 517) that a union must receive the affirmative designation of a majority of the employees in the unit (whether by election, designation cards or other method) before it is entitled to represent all of such employees for purposes of collective bargaining.

The court below cited (116 F. (2d), at p. 588) the case of *Virginian Ry.* v. *Federation,* 300 U. S. 515, 560, which held that a union receiving a majority of the votes cast in an election in which a majority of the employees participated was entitled to be certified as a representative of all such employees under the Railway Labor Act (44 Stat. 577, as amended by 48 Stat. 1185, 45 U. S. C. A., §§151-163). In other words, this Court in the *Virginian* case decided that the so-called "quorum rule" was prescribed by the Railway Labor Act. It did not and could not decide that the rule adopted by the Board in the *R. C. A. Mfg. Co.* case (*supra*) was applicable either to the Railway Labor Act or to the National Labor Relations Act. That question was not be-

fore it. In the *Virginian* case, the District Judge had squarely rejected the rule later adopted by the Board in the *R. C. A. Mfg. Co.* case, for he held that a certification was void when based on an election in which less than a majority of the eligible employees voted (11 F. Supp. 621, 628). This point was not appealed to the Circuit Court of Appeals (84 F. (2d) 641, 652) and, of course, was not before this Court.

Furthermore, the decision in the *Virginian* case could be important only as an analogy. The language of the National Labor Relations Act ("representatives designated * * * by a majority of the employees in a unit") much more clearly requires the affirmative designation of a majority of such employees than does the language of the Railway Labor Act ("The majority of any craft or class of employees shall have the right to determine who shall be the representatives"). Whereas the Railway Labor Act clearly envisions the "quorum rule", the National Labor Relations Act equally clearly requires an affirmative majority designation.

In any event, it is essential to both employers and employees who are subject to the Act that the interpretation of this section shall be finally settled by this Court, rather than that such a matter of pure statutory construction shall be left subject to the changing interpretation of the Board.

Point II. This Court should review the abuse of the Board's discretion in denying petitioner representation at the election.

The choice of the persons or organizations who are to represent the employees in the collective bargaining process is obviously one of the most fundamental steps in the whole field of labor relations. And since that step is more exposed

to fraud and mistake than perhaps any other step in such process, the need for the greatest possible safeguards against such fraud and mistake is equally obvious.

Under Section 9 (c) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A., § 159 (c)) the Board has power and discretion to investigate and determine the designation of a bargaining representative by the employees. But with that power and discretion goes a duty to utilize all possible means for assuring that the real choice of the actual employees is ascertained, and that by methods, the fairness of which will be patent to all. Consider, then, what happened in the case at bar.

The procedure adopted for the August 21, 1937, election, and there agreed upon by all parties (Board, Union and petitioner) as fair and equitable was that a representative of the Board should preside at the election and that representatives of the Union and petitioner should be present and act as tellers in order to check the eligibility of voters and to see that the election was conducted according to the terms agreed upon (R. 22-23, 32-35, 247-249). However, in the election of February 24, 1938, when petitioner asked for similar representation, the request was denied (Bd. Ex. 1-E, Case No. R-342, R. 54-55, 62). This denial was expressly based on the ground of the Board's general policy to prohibit the presence of any representative of the employer unless the Union consented (which it here refused to do) and in no way upon any interference or irregularity in the former election.

It is unquestioned that petitioner made adequate and timely requests, both in writing and orally, for such representation, that the grounds upon which such requests were based were fully specified, and that such requests were unconditionally denied (Bd. Exs. 1-B, 1-D and 1-E, Case No. R-342, R. 48-49, 52-55, 62, 74-76, 257-258).

The underlying reasons why petitioner desired and should have been allowed to have a representative present at such election are simple and obvious. Petitioner was a party to the proceedings and had a very real interest in the outcome of the election. This interest was not in whether the Union was or was not chosen as the bargaining agent, but in whether or not the choice was fairly made and represented the real wishes of petitioner's employees.

In the said election certain men who were not eligible to vote were permitted to do so, and their votes were counted; on the other hand, representatives of the Union, who of course were permitted to attend the election, challenged certain other voters and these challenges were accepted by the Board's representative without any investigation with the result that the votes of these men were not counted, although they were clearly eligible. Some of these cases appear from the evidence (R. 93-110). How many more such cases there actually were, petitioner does not and cannot know. Furthermore petitioner has no means of knowing and does not know whether or not the persons who voted under names appearing on petitioner's payroll of September 24, 1937, were actually the same persons then employed by petitioner. The opportunities for fraud and mistakes in the conduct of the election are obvious; the equally obvious means for guarding against them were rejected by the Board. The presence of a representative of the petitioner at the election, while in no possible way affecting the results of properly cast votes would have obviated such abuses in the conduct thereof.

Petitioner contends that under the facts shown it did not receive "procedural due process" and that this Court should intervene to settle and state the limits of administrative discretion in ascertaining the employees' choice of a bargaining representative.

Point III. The eligibility of discharged employees to vote in a bargaining election presents an important question of Federal law which has not been, but should be, settled by this Court.

Inseparably interwoven into the question of the selection of bargaining representatives is the question of eligibility to participate in such selection. The National Labor Relations Act provides in Section 9 (a) (49 Stat. 453, 29 U. S. C. A., § 159 (a)) that such designation or selection shall be made by "the employees in a unit appropriate for such purposes", and in Section 9 (c) (49 Stat. 453, 29 U. S. C. A., § 159 (c)) that the Board, in investigating such designation, "may take a secret ballot of employees".

The problem, therefore, is the construction of the term "employee", which is defined in Section 2 (3) (49 Stat. 450, 29 U. S. C. A., § 152 (3)) as follows:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *."

Because of a very serious slump in business, petitioner found it necessary to discharge 174 of its employees during the period between September 24, 1937, and February 24, 1938, that is, between the date by which the Board determined the eligibility of voters and the date of the election. That the decline in business, which continued for many months, compelled a reduction in the working force is overwhelmingly demonstrated by the evidence (Res. Ex. 9, Case No. III-C-165, R. 166-167, 270-272, 277-279). There is no finding to the contrary by either the Board or Court. Thus

it is apparent that, with the possible exception of Winans and Anderson, none of those 174 workmen could in any manner claim to be an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice."

It is equally undisputed that petitioner was under no obligation to rehire any of these men, and the Board and court below correctly so found (116 F. (2d) 586, 588, Res. Ex. 4, Case No. III-C-165, R. 128, 131, 258, 516).

Nevertheless, the Board concluded (R. 131, 487) that these 174 former employees—workmen who had been discharged for a valid business reason and whom petitioner was under no obligation to rehire—were entitled to participate in the selection of a bargaining representative for petitioner's employees, and 114 of them did actually vote in that election (Res. Ex. 4, Case No. R-342, R. 60, 65).

These workmen were not "employees" of the petitioner in any ordinary sense at the time of the election, and if a special definition of the term, beyond that set out in the Act itself, is to be adopted, it is important that it should be reviewed and settled by this Court.

The court below cited two cases as authority for its departure from the plain meaning of section 9 (a), both of which are clearly distinguishable from the case at bar.

In *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dept.*, 93 F. (2d) 340, 342, a laid-off employee with seniority rights was held eligible to vote in an election under the Railway Labor Act. There was and is no seniority rule in petitioner's plant (R. 243, 286-287, 314), and both the Board (R. 441) and the Circuit Court of Appeals (116 F. (2d) 586, 588, R. 516) so found.

In *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 213-214, 219, the Board found there was a continuing contractual employment despite the maritime practice of "signing off" shipping articles, and this Court

held there was sufficient evidence to support such finding. In the case at bar, the testimony clearly showed that there was no obligation to rehire such discharged employees (Res. Ex. 4, Case No. III-C-165, R. 128, 131, 258) and the court below expressly so found (116 F. (2d) 586, 588, R. 516).

Neither of these cases, therefore, supports the decision below, for in both there was an obligation to continue or resume the employment relation. In the case at bar there was no such obligation; it could not possibly be determined how many or who of the 174 former employees would ever return to work at petitioner's plant, for petitioner had and has an unquestionable legal right to refuse to rehire any or all of them so long as it does not use such right as a cloak to cover discrimination against the Union.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45-46.

First Annual Report, National Labor Relations Board, p. 77.

The court below rested its decision upon the "mutual expectation of reemployment" (116 F. (2d) 586, 588, R. 516). But one who expects to be an employee at some future date is not now an employee within the definition contained in section 2 (3) of the Act (49 Stat. 450, 29 U. S. C. A. 152 (3)), when he has no present right to such reemployment.

The court below has, therefore, gone far beyond the statute and beyond any decision of this Court in deciding this important question of statutory construction. The question is of the utmost importance, especially in industries in which the labor turnover is large and rapid. Are all former employees who hope or "expect" to be reemployed at some future date to be allowed to participate in the choice of bargaining representatives? Such a ruling would easily lead to the absurd situation that the number

of "employees" entitled to vote in such an election might be several times as great as the number who ever had been or could be employed at any one time. And in such event, what is left of the right the actual employees—those actually working in the plant—"to bargain collectively through representatives *of their own choosing*" (Section 7, 49 Stat. 452, 29 U. S. C. A. § 157)?

Petitioner submits that the court below has decided a Federal question of great public importance in a way which goes far beyond any decision of this Court, and that this important question should be reviewed and determined by this Court.

Point IV. In holding that the Board's findings were supported by evidence, the decision of the Circuit Court of Appeals is probably contrary to prior decisions of this Court.

This Court has settled the rule regarding the amount of evidence necessary to support a finding of the Board and to make the same conclusive under the statute. In *Consolidated Edison Company of New York Inc.* v. *National Labor Relations Board*, 305 U. S. 197, 229, this Court, per the Chief Justice, said:

> "We agree that the Statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence.—Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Now, what "substantial evidence" did the court below accept as supporting the Board's findings of discriminatory discharge? The entire opinion of the court below as to this point is as follows (116 F. (2d) 586, 589, R. 517):

> "As to that part of the order directing the reinstatement of Winans and Anderson little need be said. The

words which each put in the mouth of the foreman who laid him off, if the Board cared to credit their testimony in preference to the reasons given by the company witnesses, require us to accept the finding of discrimination; we cannot say that it is wholly without 'substantial evidence'."

The entire testimony of Winans on this subject—the "words he put in the mouth of the foreman who laid him off"—is so short that it may profitably be quoted here (R. 233-234, 242, 243):

"Q. Who laid you off?
A. Fred Johnson, the foreman.
Q. Your foreman?
A. Yes.
Q. Did you have some conversation with him at the time you were laid off?
A. I did.
Q. Was anybody else there besides yourself and Mr. Johnson?
A. No, nobody. He came over to the machine where I was and talked to me.
Q. The conversation took place when, please, that is, what time of day?
A. Just before quitting time, I would say just a half hour or an hour.
Q. What time is quitting time?
A. Four thirty.
Q. Will you tell us what Mr. Johnson had to say to you?
A. It was about four o'clock at the time. We had worked later before that.
Q. What did Mr. Johnson have to say to you when he laid you off?
A. He came over and he said, 'I am very sorry, I got some bad news for you.'
Q. What else did he say, if anything?
A. Well, that is what he said, and he said, 'I got to lay you off', and I said, 'Well, I am not surprised. I have been expecting it for a long time.' Well, he said, 'I got bad news for you, I got to lay you off'.

Q. Yes.

A. And I told him I had been expecting it, I didn't think my position in the union was doing me any good at the time. He said 'That is something I am not at liberty to talk to you about, not at liberty to discuss with you.'

Q. Was anything else said?

A. He said, 'I haven't anything against your work, and nothing against you. So far you have conducted yourself, done your work well, and as soon as things pick up to normal again I will try to get you back on.' "

* * * * * * *

"Q. What did your foreman tell you about your chances of getting back to work at the time you were laid off in January?

A. He said he would do his best to take me on as soon as things picked up. He said the reason he had to lay me off there were old employees out in the other part of the shop, and he would have to give them the preference, they would have to be given the preference."

* * * * * * *

"Q. (By Mr. Crotty) When did Mr. Johnson tell you the other people, these older people in other departments were to be given preference when it came to transferring them in your department?

A. When he explained to me that things in the shop were slack, and he had to lay off about three of us in there.

Q. Was this about the time you were laid off?

A. Yes."

Of what do these "words" consist? A simple statement of fact that things in the shop were slack and that certain employees, including Winans, would have to be laid off. Naturally that is "bad news" for any one in such a situation. That lack of work was the only reason is further shown by the foreman's statement that he had nothing

against Winans or his work and would try to get him back on again when things picked up to normal, which certainly had not occurred by the time of the hearing (Res. Ex. 9 and 10, R. 166-167, 271-274). Finally, there is the statement that the foreman was not at liberty to discuss the Union or Winans' position in it. This was unquestionably true, in view of the specific instructions from the Superintendent that the foremen were not to discuss the Union or unionism with the men in any way, shape or form (R. 327, 291-292, 323-337). The mere fact that the foreman had been instructed not to discuss the Union obviously cannot be twisted into an admission that Winans was discharged because of Union activity.

Thus it is apparent that there is nothing in the statements of Winans' foreman which was substantial evidence in support of the Board's finding of discrimination.

Anderson's testimony in regard to the statements of the foreman at the time of his discharge is even less specific (R. 194-195):

> "Q. Who laid you off?
>
> A. Mr. O'Brian, the foreman came and told me.
>
> Q. Did you have any conversation with Mr. O'Brian when he laid you off?
>
> A. It was about five minutes before the time to quit.
>
> Q. Was this the lunch time, was it at lunch time or in the evening?
>
> A. In the evening, in the afternoon, about five to four, and he came and told me he had bad news for me, that he would have to lay me off. He said, 'I will have to lay you off', and I said, 'It isn't any surprise to me, because I have been expecting this for sometime.' And I said, 'It seems to me you could pick on some of the newer men, because my services here are much longer than theirs, than some of them, and they are being retained, and I couldn't understand it'—he thought the company was being fair in regard the lay-off, I thought the company was unfair in calling his attention to the bore grinding department, as there had

been practically all the union members laid off, and the night crew, they were non-union members, had been retained and put on in the day time.

Q. What?

A. The night crew, that had been working nights, most of them were not members of the union, and the members of the union had been laid off, that were working in the day time, and being replaced by non-union members that were working nights.

Q. Was there anything else said at that time, do you know?

A. I asked Mr. O'Brian, or was wondering if I could not see Mr. Brandel, that I thought that I was being discriminated against."

There is not even a scintilla of evidence in this testimony to the effect that the foreman admitted, expressly or inferentially, that Anderson's discharge was caused by his Union activity. Anderson did practically all of the talking; the foreman merely stated that he would have to lay Anderson off and that he thought the company was being fair in regard to the layoff. Where could the Court below possibly find "substantial evidence" in these "words put in the mouth of the foreman"?

It is thus apparent that the court below has departed widely from the decision of this Court in the *Consolidated Edison* case (*supra*). Petitioner, therefore, calls upon this Court to exercise its power of supervision in order to secure uniformity in the enforcement of this Act.

Conclusion.

Petitioner respectfully submits that this case presents questions of law in regard to the designation of collective bargaining representatives, the Board's discretion in conducting the selection of such representatives and eligibility to participate in such selection which are of the utmost importance to a great many employers and employees subject

to the Act, and which have not been, but should be, settled by this Court; and further that the decision of the Circuit Court of Appeals below that the findings of the Board were supported by evidence is contrary to the previous decisions of this Court and to sound principles of law. For these reasons petitioner respectfully requests that this Court review and reverse the decision below.

Respectfully submitted,

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